As to the third point—Art. 13 of the Law of Forced Sales, I agree with the solution suggested by the Chief Justice. The case to which the article applies, is where the "*tessaruf*" of a property is being sold for the debt of a person said to be the *mutessarif*. In such a case any one else who claims to be the real *mutessarif* must assert his claim before the close of the auction. This does not apply to a case where the person in whom the *raqabé* is vested asserts that property which was sold as mulk ought to have been sold as ijaretein.

Appeal dismissed.

[TYSER, C.J. AND BERTRAM, J.]

EUDOXIA NISSIPHOROU

v.

DESPINOU ANASTASSI AND OTHERS.

ACKNOWLEDGMENT—ACKNOWLEDGMENT OF DEBT IN CUSTOMARY FORM—LAW AS LAID DOWN BY SUPREME COURT—FICTITIOUS ACKNOWLEDGMENT IN SUBSTANCE A WILL—WILLS AND SUCCESSION LAW, 1895—LAW OF DEATH-BED ACKNOWLEDGMENTS—INAPPLICABILITY TO CHRISTIANS—MEJELLE, ARTS. 73, 77, 1572—1612, 1628.

The law as to the conclusiveness of acknowledgments of debt in customary form, as laid down by the Supreme Court, though not in accordance with the interpretation accepted in the rest of the Ottoman Empire must be taken to be part of the law of Cyprus.

An acknowledgment of a genuine debt, though coupled with an agreement between the parties that it shall not be enforced till after the death of the maker, if made "in customary form," is conclusive upon the heirs of the maker after his death.

A fictitious acknowledgment of a non-existent debt, if coupled with an agreement between the parties that it shall not be enforced until after the death of the maker (though in customary form) is in substance a will, and if the maker is not a Moslem, is invalid unless duly attested as a will in accordance with the Wills and Succession Law, 1895.

PER TYSER, C.J.: *Rules of procedure and evidence in the Mejelle are now superseded by those in force in the Courts of Cyprus.*

In construing any enactment in the Mejelle so much of the enactment as concerns practice and procedure must be severed from that which regulates the rights of the parties.

In Art. 1610 of the Mejelle the enactment that "if the acknowledgment (sened) *is free from the taint of fraud and suspicion of forgery it is done in accordance with it," must be read with reference to the procedure then existing, under which in spite of this enactment the Defendant might bring his "defi dawa." Under the practice now existing it is allowable for the Defendant to set up any matter, which by the existing law and practice can be regarded as a defence to the claim.*

Consequently, proof that an acknowledgment was intended by all parties thereto to be a fraud on the heirs would be a defence to an action upon it.

PER BERTRAM, J.: *The provisions of the Mejelle relating to gifts and acknowledgments made in mortal sickness are part of the Sher' law of inheritance and since the Wills and Succession Law, 1895, have no application to Ottoman Christians.*

This was an appeal from the District Court of Papho.

The action was brought upon an acknowledgment of debt in customary form for £100. The document in question is set out in the judgment of the Chief Justice.

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The maker of the acknowledgment was an old woman called Iordanou Ianni. She was in infirm health and realised that her end was approaching. She was not however confined to her bed. Plaintiff was the grand-daughter of Iordanou. Before her marriage she had lived for nine years with her grandmother and had rendered her services in connection with her house, and during this period her grandmother had had the use of certain property belonging to her. The value of this property the Court estimated at about £2 per annum. When Plaintiff married (so it was alleged by her husband) her grandmother promised to give her £100 " as wages and income of property." Subsequently (so he alleged) the grandmother gave to the Plaintiff two contracts of sale purporting to sell to her certain immoveable property, but subsequently they were advised that these were not good and pressed for a bond.

Shortly before her death Iordanou arranged to give the acknowledgment of £100 now sued upon and at the same time another acknowledgment in favour of one Stylianou (another member of the family) for £80. The attendance of a certifying officer was procured and at the request of Iordanou the village schoolmaster drew up the two acknowledgments, and Iordanou signed them in the presence of the certifying officer, the schoolmaster and other witnesses. During these proceedings the other members of Iordanou's family, her natural heirs were sitting in a neighbouring café and apparently knew what was going on. Afterwards one of them Theophanou remonstrated with her. She replied that she would give Theophanou a blow in the eye; that she intended to let the Plaintiff and Stylianou have their due, and that Theophanou would get her share, if anything was left. There was conflicting evidence as to the state of Iordanou's health at the time. She was said to have remarked that if after her death any other documents came to light they were to be destroyed—apparently alluding to the two contracts of sale above referred to.

Plaintiff immediately commenced an action upon the acknowledgment, but Iordanou died before the case came on for hearing, about three weeks after signing the acknowledgment.

The Issues settled were:

1. Was there consideration ?

2. Was the bond given in mortal sickness ?

The Court also indicated, as a legal question for consideration—was the consent of the other heirs necessary to the validity of the bond ?

The Court found as a fact:—

1. That there was no good consideration for the bond.

2 That deceased was not in mortal sickness when she signed it.

3. That the bond was in the nature of a bequest.

They held accordingly that it was void as not having received the consent of the other heirs.

They added: "We do not find evidence of force or fraud in the "signing of the bond, for we believe that the deceased wished to benefit "the present Plaintiff, but unfortunately for her adopted the wrong "way or postponed it until too late."

The Court accordingly dismissed the action.

The Plaintiff appealed.

Artemis for the Appellant.

Neoptolemos Paschales for the Respondents other than Despinou and Stylianou.

The Court remitted the case to the District Court.

Judgment: THE CHIEF JUSTICE: In this case the Defendants are sued as heirs, on a bond given by their deceased ancestor to the Plaintiff, which contains an admission of debt.

The bond is in the following form:—

ΚΑΛΟΝ ΔΙΑ £100 0 0.

Ἡ ὑποφαινομένη κάτωθεν Χ" Ιουρδανοῦ Γιαννὴ ἐκ τοῦ χωρίου Ἐπισκοπῆς τῆς Ἐπαρχίας Πάφου χρεωστῶ νὰ πληρώσω εἰς πρώτην ζήτησιν ἢ διαταγὴν τῆς Εὐδοξίας Νησιφόρου ἐξ Ἐπισκοπῆς τὸ ποσὸν λιρῶν ἀγγλικῶν ἑκατὸν (ἀριθ. £100 0 0) *ἰσάξιον ἔλαβον παρ' αὐτῆς εἰς μετρητὰ ὑποχρεοῦμαι δὲ νὰ τῆς πληρώσω τόκον 9% τὸν χρόνον ἢ εἰς ὅλα τὰ δικαστικὰ ἔξοδα ἐν περιπτώσει ἀγωγῆς.*

Ἐπισκοπῆ 16/1η *Μαρτίου* 1909.

Οἱ Μάρτηρες : *Π Χρεώστρια :*

Προκόπιος Ἰωάννου, *+ Ἰδιόχειρον σημεῖον*

δημοδιδάσκαλος ἐξ Ἁγίας Εἰρήνης *Χ" Ἰουρδανοῦς Γιαννὴ*

Κυρηνείας *τοῦ χωρίου Ἐπισκοπῆς.*

Μιχαὴλ Γιαννόπογου ἐκ Κτήματος.

This is an acknowledgment of debt in customary form (Mejellé, Art. 1609) and contains also an admission that the person who made it had received consideration, namely an amount of money equal to the debt.

The first question to be considered is can a person sued on that acknowledgment prove either that the acknowledgment of debt is false or that the admission as to the consideration is false?

The question we have to consider is whether evidence may be adduced to prove that the acknowledgment is not true, or that the admission as to the consideration is false.

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Now it appears from Art. 1610 of the Mejellé that no attention is paid to a mere denial of the debt.

Therefore it seems to me that in the absence of some matter extraneous to the acknowledgment such as mistake, fraud or illegality, the acknowledgment of debt is binding even though it is to be regarded as a mere gift.

The further question arises whether the acknowledgment is binding in cases where fraud or illegality can be proved.

The Plaintiffs rely on Art. 1610 of the Mejellé which enacts amongst other things that " if the sened is free from a trace of fraud or a suspicion of forgery action is taken in accordance with it."

Now this probably means as has been said by the Supreme Court that the obligation arising out of the admission in the sened is to be enforced unless there is a trace of fraud in the bond itself.

But this is not an exhaustive statement of the law. No one would contend that if the sened expressed that the debt was due for the price of a slave or mal muteqavvim or the wages of murder or crime that this section would make the obligation imposed by the sened enforceable.

Neither could it be so contended if either of the above suppositions was proved by evidence outside the sened.

Similarly if it were proved that the sened was obtained by fraud or was an instrument of fraud either from internal evidence or from evidence outside the sened the person defrauded might resist the claim arising out of the admission in the sened.

Suppose for instance a person obtained a *deyn sened* for the price of goods by fraudulently representing that he had delivered such goods when as a fact he never had such goods to deliver and had not delivered them, could it be contended that the man who made the sened could not prove this and resist payment ?

Or suppose the *deyn sened* had been obtained for the price of a store full of timber which had merely a show of timber in front and nothing behind, and there was intentional deception, could it be contended that *muqirr* could not resist payment ?

It seems clear too that if an acknowledgment of debt can be proved to be a fraud on the heirs the sened is no proof, that is to say it will not be acted upon.

If a *deyn sened* is made in favour of a man's heirs while he is in his last sickness, the admission is no proof because there is suspicion of filching property from the other heirs based on his last sickness (Art. 73) but if the sened is made while in good health there is no ground for suspicion, that is to say, the mere fact that his heirs will be injured

is not evidence sufficient to prove fraudulent motives, because a man in good health and of sound mind may give all his property away if he so wishes.

The difference in procedure in Sher' Courts and the Civil Courts established in the country is such that great difficulty is felt at times in understanding the Sher' law.

But one thing is clear, that that law aims at the strictest justice, and it is quite certain that by some process fraudulent claims are disallowed. There are proceedings in Sher' Courts not in use in the Civil Courts such as the *defi dawa* by which justice is insured.

There is also a great difference in the laws of evidence prevailing in the Sher' Courts and the Cyprus Civil Courts of Justice, both as regards the proofs which may be adduced, *e.g.*, who are competent witnesses—and also as regards the evidence which may be called in a particular action, *e.g.*, sometimes evidence, which could only be produced in a *defi dawa* under Sher' procedure, might be adduced in the original action in the Civil Courts.

Now Art. 73 is authority for saying that if an acknowledgment of debt can be proved to be a fraud on the heirs that acknowledgment cannot be looked upon as a proof of debt.

The Mejellé however lays down very strictly what facts may be regarded as evidence or proof of such fraud.

One of these facts appears to be, that the man who makes the admission is in his last sickness. Perhaps under that law proof of the last sickness is necessary to prove such fraud.

The fact that the person making a *deyn sened* was in his last sickness seems to have been regarded as conclusive evidence of fraud if the beneficiary was one of the man's heirs where the admission is of a debt (Art. 73) or of a gift or of a payment (Arts. 1601, 1598) but not if it is an admission about the receipt of an emanet (Art. 1598) or the wrongful appropriation of a thing entrusted to him by the heir (Art. 1598).

Also an admission in a man's last sickness made in favour of a stranger with regard to property if it is clear that it is false is to be regarded as a gift or a bequest according to the circumstances, and will only be good in either case up to a third of his property (Art. 1601).

It may be that the proof that a person making an admission is in his last illness at the time when he makes it, has still the same effect, conclusive or otherwise, as it has under the Sher' law.

Here the person making the admission was not in her last sickness. Yet in my opinion it is possible to show whether or no the transaction is a fraud on the heirs.

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The effect of Art. 73 seems to be that an admission for the purpose of defrauding an heir is not a proof of debt, but by the Sher' law when it is made in health the fact that heirs will be deprived of their share of the inheritance is not sufficient reason for rejecting the admission as a proof. It does not follow that if a man in health is proved to have expressly stated that he made an admission of debt for the purpose of defrauding his heirs on the condition that the beneficiary was not to enforce the claim till after his death, and that the admission was to be treated as a will, and it was further proved that the beneficiary agreed to this, that then the admission would not be regarded as fraudulent or as taking effect as a will. Neither does it follow that if there is unimpeachable evidence that the sole intention of both parties to the sened was to defraud the heirs that then the admission is to be accepted as conclusive proof.

However that may be in Sher' law it is really a rule of evidence. The fundamental principle seems to be that where there is evidence of fraud based on something more than mere conjecture the admission will not be regarded as a proof of debt, but that the evidence to prove fraud must be of a particular nature.

Now while the fundamental rules of law regulating the rights of property and the rights of persons as laid down in the Sher' law are still the law of the land the rules of evidence in the Civil Courts have for a long time been varied, so as to suit the modern requirements of society and the change in the rules of procedure—especially the abolition of the *defi dawa*, and evidence has been admitted in defence of a claim which under Sher' Court procedure would only have been available in a *defi dawa*.

One rule of evidence is that fraud may always be proved by any evidence which is sufficient to prove its existence.

Ordinarily when a contract is reduced into writing evidence cannot be called to contradict the writing, but when fraud is imputed any consideration or fact, however contrary to the writing, may be proved to show the fraudulent nature of the transaction.

Therefore evidence is admissible to show that the intention of the parties was to defraud the heirs, that is to say, that there was no intention to benefit the beneficiaries during the life time and at the expense of the deceased.

At the trial the main issue settled was: Is there any consideration for the bond ?

This is immaterial if the *deyn sened* was given *bona fide*, because it is not denied that the deceased was in full possession of her faculties

at the time she made the sened. It is also proved that she was not in her last sickness. Therefore she might make a gift or admission binding the whole of her property if it was to take effect at once.

It is material however as bearing on the question of fraud, if the amount admitted to be due is really due it would be almost impossible to find a *deyn sened* fraudulent.

I will now consider what are the findings of the Court below and the judgment given.

First of all it appears that two of the Defendants, Despinou and Stylianou, did not dispute the validity of the bond so judgment ought to go against them for something.

As to the others the Court find:

1. There was no good consideration for the bond.
2. That deceased was not in her last sickness when she signed the bond.
3. That the bond was in the nature of a bequest to one heir.

I am not certain what this last finding means. Does it mean that the Plaintiff received the document with an understanding that it was only to come into effect after the death of the deceased, or does it mean that the deceased gave it with the intention of benefiting the Plaintiff after her death, but the Plaintiff took it as an existing obligation binding deceased.

Now if the Plaintiff took the bond *bona fide* as an obligation binding deceased to pay on first demand, in my opinion, the deceased not being in her last sickness and being of sound mind could not rely upon any reservation that she had in her mind that the *deyn sened* was not to be enforced till after her death.

It would be no defence to her and consequently no defence for her heirs.

The real questions are:

1. Was the sened received by the Plaintiff as a repayment for moneys owing and services rendered before, or as a gift out of mere gratitude for these services, or even merely as a kindness; or
2. When she received it was she a party to a transaction to defraud the heirs ?

There is some doubt whether the Court had these questions clearly in their minds.

If they had there is not sufficient ground for upsetting their decision. But the case must go back to them for a specific finding on these

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facts and with a direction to enter judgment in accordance with the findings. Costs of appeal to be in discretion of the District Court.

I have read and agree with Bertram, J.'s judgment.

To sum up: Rules of procedure and evidence in the Mejellé are now superseded by those in force in the Courts of Cyprus.

In construing any enactment in the Mejellé so much of the enactment as concerns practice and procedure must be severed from that which relates to the rights of the parties.

In Art. 1610 of the Mejellé the enactment that "if the acknowledgment (sened) is free from the taint of fraud and suspicion of forgery, it is done in accordance with it" must be read with reference to the procedure then existing, under which in spite of this enactment a man might bring his *defi dawa*. Under the practice now existing, it is allowable for the Defendant to set up any matter, which by the existing law and practice can be regarded as a defence to the claim.

Consequently proof that an acknowledgment was intended by all parties thereto to be a fraud on the heirs would be a defence to an action upon it.

BERTRAM, J.: This is a case which depends upon the effect of an acknowledgment of debt in customary form which is alleged to have been given as a bequest. It involves question on which various observations have been incidentally made in some of our recent decisions, and it furnishes a convenient opportunity of explaining the state of the law, as fixed by the decisions of this Court, upon two points:

1. The conclusiveness of acknowledgments in this form;

2. Their effect when they are, in substance, testamentary dispositions.

First, then, as to the question of the conclusiveness of these acknowledgments. I will first consider this question, apart from the decisions of this Court, simply from the point of view of the Sher' law, (which is the common law of this country), and the enactments of the Mejellé (which is a codification of a part of it), and of these latter, in particular Arts. 1589 and 1610.

An acknowledgment according to the Sher' law is not a contract but a special mode of proving an existing obligation. An acknowledgment as such creates no rights. It merely proves them. (See Mejellé, Art. 1628). For this purpose the Sher' law attaches special force and efficiency to "acknowledgments." The Hedaya, the Multeqa, and every other authoritative digest contains special chapters upon them, and the law on the subject is codified in Arts. 1572 to

1612 of the Mejellé. The leading principle of the law, as explained in the Hedaya is as follows:—

" When a person possessing sanity of mind and arrived at the age " of maturity, makes an acknowledgment of a right, such acknowledg- " ment is binding upon him." (*Cf.* Mejellé, Art. 1588). Generally speaking, the acknowledgments here referred to are verbal acknowledgments made in the presence of witnesses, but by a special chapter of the Mejellé (1606, *seqq.*) it is explained that a certain class of written acknowledgment has the same binding effect as verbal acknowledgments. Thus having declared in Art. 1606, that " an admission in " writing is like an admission by word of mouth," and having explained, in Art. 1607, that an acknowledgment drawn up by a man's direction and signed by him is equivalent to an acknowledgment by the man himself, and, in Art. 1608, that formal entries in a merchant's books are held equivalent to acknowledgments, the Mejellé declares in Art. 1609, that any written acknowledgment " *if it is written in form* " (*mersoum*) *i.e., if it is written in accordance with practice and custom* " has the same effect as an admission by word of mouth, and in Art. 1610, it further explains, that if the signature or seal of a person to such an acknowledgment is duly admitted or proved, no attention is paid to any denial made by such a person, but judgment is given in accordance with his acknowledgment. In other words it is given the same effect as that given to a verbal acknowledgment by Art. 1588. There is no intention in these articles to give any special validity to a written acknowledgment, (as compared with a verbal acknowledgment) simply because it is in writing, or because being in writing it is in a particular form. On the contrary the principle of these sections is that it is only written acknowledgments which are *mersoum* that have the same efficacy as duly attested verbal acknowledgments. As the matter has been explained to us by the Chief Qadi, " the difference between a " *deyn sened* that is *mersoum* and a *deyn sened* that is not *mersoum*, " is this, that the first (the signature or seal being admitted or proved) " proves the debt of itself, the second (if the debt is denied) must be " supported by evidence independently of the document itself." As it is picturesquely put by an eminent Turkish Commentator, a written acknowledgment that is not *mersoum* has no more legal efficacy than something which a man scribbles on a wall or the leaf of a tree. Art. 1611 further explains that a *mersoum* acknowledgment, which is conclusive upon a man himself, is equally conclusive upon his heirs.

We now come to Art. 1589. This article lays down a qualification to the binding character of acknowledgments. It does not make any distinction between the verbal and the written acknowledgment,

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nor is any such distinction either known to the Sher' law or observed in the Courts of the Turkish Empire. That qualification is this, that " if anyone maintains that he has not spoken the truth in an " acknowledgment, the person in whose favour the admission was made, " is made to take an oath that it is not false." This does not mean that the burden of proof is cast upon the person in whose favour the acknowledgment is made to show that the acknowledgment is really true. This is not in the least the meaning of the tendering of an oath to an opponent in the Sher' law. As it is explained in Art. 77 of the Mejellé: " Evidence is for the proof of what is not clear, an oath " is for the confirmation of what is procured," or, as it is put by Savvas Pasha (*Theorie du droit Musulman*, Vol. II, p. 243). " Le juge défère " donc le serment parce qu'il ne lui reste plus qu'a éliminer un doute " et à satisfaire la partie qui se croit lesée et qui tient de la loi le droit " de faire subir à son adversaire l'épreuve du serment." The practical effect of the administration of the oath is this, that if the person suing on the acknowledgment takes the oath, judgment is given in his favour; if he refuses, it is given against him. If the oath is taken it is conclusive. The other party cannot call witnesses to prove it is false. His only remedy is a prosecution for perjury.

Such, so far as I have been able to ascertain it, is the Sher' law on this question as codified by the Mejellé.

Fortunately, or unfortunately, a series of decisions of this Court have settled the law in Cyprus on very different lines. According to the law, as laid down by this Court, Art. 1582 enumerates a general principle to which Art. 1610 constitutes a peculiar exception. Verbal acknowledgments, and written acknowledgments not " in customary form " are not conclusive and (to use the language of the judgments) may be " falsified." Written acknowledgments " in customary form " however, (in the absence of forgery or fraud, and subject to certain other exceptions which have since been grafted upon the doctrine) are in all cases conclusive though they may be demonstrably false. If a person, who has given an acknowledgment (whether verbal, or written, if the latter is not " in customary form ") is sued for the debt referred to, and in the action repudiates, or, as it is said " falsifies " the acknowledgment, the effect of this repudiation is to cast the onus of proof on the other side. That is to say, the Plaintiff in such a case must prove the debt apart from the document. It is not however permitted to " falsify " an acknowledgment " in customary form." The doctrine of the conclusiveness of an acknowledgment " in customary form " was first referred to in *Haralambo v. Haralambo* (1891) 2 C.L.R., p. 25, and was first definitely laid down in *Pieri v. Haji Ianni* (1893) 2 C.L.R., pp.

158-9; it was carried to its extreme length in *Sotiri v. Sotiri* (1893) 2 C.L.R., 177, and it is referred to as settled law in *Ohannes v. Stepanian* (1895) 3 C.L.R., 163 and *Michaelides v. Andoniou* (1895) 3 C.L.R., 175. The doctrine, that the repudiation of an acknowledgment, not in customary form, casts the onus of proof on the person relying upon it, is enunciated and referred to in the following cases, *Solomo v. Elia* (1889), not reported but embodied in 2 C.L.R., 161, *Pieri v. Haji Ianni* (1893) 2 C.L.R., 160, *Haji Petri v. Haji Petri* (1893) 2 C.L.R., 187, *Anastassi v. Haji Kyriako* (1895) 3 C.L.R., 243, and *Queen's Advocate v. Van Millingen* (1895) 3 C.L.R., 219.

In a previous judgment (*Hypermachos v. Dimitri* (1908) 8 C.L.R., 53), we have suggested that the doctrine of our Courts on these questions may some day be subject to re-consideration, but an examination of the cases above enumerated shows that that doctrine has now been so completely established and has now been acted on for so many years that it must be taken to be part of the law of this country, and subject only to re-consideration by the Judicial Committee of the Privy Council. It may be unfortunate from one point of view that in attempting to administer the Sher' law our Courts in this matter should have diverged so distinctly from the interpretations of it generally accepted in the rest of the Ottoman Empire. In all probability however the result worked out by the decisions of this Court is very much more consonant with the principles of procedure which our Courts follow than the pure Sher' doctrine. Such practical inconveniences as might have seemed likely to arise from giving an absolutely conclusive effect to these documents in all cases have now been obviated by the limitations to the doctrine suggested in *Sotiri v. Sotiri* and recently emphasised in *Sotirio v. Haji Zissimo* (1908) 8 C.L.R., 20.

Some of the expressions of opinion above referred to as to the shifting of the onus of proof may require qualification, but the general result worked out by this series of decisions is probably an effective instrument of justice.

This being the doctrine of our Courts with regard to these acknowledgments, it remains to consider a special development of it with reference to documents which though in form acknowledgment are in substance a testamentary disposition.

Acknowledgments are either acknowledgments of genuine debts, or else they are fictitious acknowledgments, in which case their real nature is that of a gift. Sometimes however it is sought to charge the estate of a deceased person with an acknowledgment, which is neither a genuine acknowledgment, nor yet a gift, but is in real truth a legacy. In such a case it has been held that it is open to the heirs

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to show the real character of the document, and that if it is proved to be really a bequest, the Courts will treat it accordingly. This was decided in the cases of *Haralambo v. Haralambo* (1891) 2 C.L.R., 21 and *Pieri v. Haji Ianni* (1893) 3 C.L.R., 153. Applying the Sher' law in these cases the Court held that where (as in *Haralambo v. Haralambo*) the acknowledgment is in favour of an heir, it must be treated as a fraud on the law, and invalidated altogether—inasmuch as the Sher' law does not permit a legacy to an heir; where on the other hand, it is in favour of a stranger, (as in *Pieri v. Haji Ianni*)it must be held good up to the amount of the disposable portion of the estate.

In laying down the law in this way, the Court was not speaking with reference to acknowledgments made in mortal sickness, but with reference to acknowledgments made during health but in contemplation of death. It came to its conclusions reasoning by analogy from what it understood to be the Sher' law as to acknowledgments made in mortal sickness.

It is not necessary here to discuss the correctness of that reasoning. It is important however to observe that the Court proceeded upon the assumption that this portion of the Sher' law was applicable to Christians. But all these provisions of the Mejellé which relate to death-bed gifts and death-bed acknowledgments are really a branch of the Sher' law of inheritance, and since the enactment of the Wills and Succession Law, 1895, it is now clear that these provisions being part of or at the least ancillary to the Mohammedan law of inheritance, have no application to Christians. Why is a death-bed acknowledgment in favour of an heir not valid according to the Sher' law unless the other heirs consent? Because under the Sher' law a bequest to an heir is void, unless the other heirs consent. But under the law of 1895 there is nothing to prevent a Christian making a bequest to an heir up to the limits of the disposable portion. The whole question has been put upon an entirely new footing by that law. The principles laid down in the case above referred to (until some more exhaustive exposition of the Sher' law is delivered) must be held still to apply to the estates of deceased Moslems, but so far as Christians are concerned they must be read in the light of the law of 1895. That law is in some respects less strict, but in other respects more strict than the Sher' law. It is less strict in its limitation of the disposable portion. According to the Sher' law, if a man has any heir at all, his disposable portion is limited to one-third of the estate. According to the law of 1895, the disposable portion varies from one-third to two-thirds, and if a man leaves neither wife nor descendants, he may dispose of the whole of his property. It is also less strict in that it allows a legacy

to an heir. It is more strict, in that it requires wills to be in writing and to be attested by three witnesses in a particular manner and in a particular form.

Applying therefore the doctrine laid down in *Haralambo v. Haralambo* and *Pieri v. Haji Ianni* to these changed conditions, the principles that these cases establish seem to be as follows:—

1. An acknowledgment, which is in substance a testamentary disposition, must be duly attested, as a will, or will be held altogether void:
2. If held valid, effect will only be given to it up to the limit of the disposable portion of the estate.

What is meant then by saying that an acknowledgment is in substance a testamentary disposition? I will endeavour to express what I take to be the effect of the previous decisions of this Court.

The first question to be asked about any such document is—Was it an acknowledgment of a real debt, or was it in substance a gift? If it was in fact an acknowledgment of a real debt, then this Court has held that it is no objection to it that it was not to be enforced till after the death of the maker. This is the effect of *Ohannes v. Stepanian* (1895) 3 C.L.R., 159, and we are informed by the Chief Qadi that this is in accordance with the Sher' law. If on the other hand it was a gift, further questions arise. Was it made "in customary form" and with the intention that it should be enforceable during the life time of the giver? If so, even though it is a pure gift and there is no consideration whatever to support it, it is binding on the giver, and, if he dies before it is enforced, equally binding on his heirs. Or was it, on the contrary, though in customary form, made under such conditions that it was not enforceable during the life time of the giver? If so, it was in substance a will. It cannot be enforced against the giver during his life time, and can only be enforced against his heirs after his death subject to the Wills and Succession Law, 1895. It should be observed that it is not sufficient that the giver alone did not intend it to be enforced during his life, or thought the donee would not enforce it, or relied upon him not to enforce it. This must be intended by both parties, and the acknowledgment must be given upon the condition, whether express or tacit, that it shall not be enforced during the donor's life. This is the effect of *Sotiri v. Sotiri* (1893) 2 C.L.R., 177, and is in accordance with what is laid down in the recent case of *Sotiriou v. Haji Zissimo* (1908) 8 C.L.R., 20.

To sum up—an acknowledgment in customary form of an existing debt, coupled with a condition that it shall not be enforced until

TYSER, C.J. & BERTRAM J.

EUDOXIA NISSIPHOROU v. DESPINOU ANASTASSI AND OTHERS

after death is good and may be enforced against a man's estate after his death. A fictitious acknowledgment of a non-existing debt, coupled with a condition that it shall not be enforceable till after death (though made in customary form) is not binding as an acknowledgment, and can only be enforced against a man's estate so far as it can be supported as a will.

Now I take it that the questions we have to ask ourselves in this case are these. First, *was this bond an acknowledgment of a real debt or was it a gift?* In other words did the deceased make this bond in favour of the Plaintiff because she honestly believed that she owed her a debt and estimated the debt at this amount, or did she make it because she was grateful for her past services, and for the use she had had of her property and wished to give her this sum as a recompense? This is a question of fact. The District Court find that " there was no " good consideration." I am not quite sure what they mean by this expression, but if they mean by it, that the bond was in effect a gift, I think there is ample evidence to justify them in so finding. Secondly, *was the bond given to the Plaintiff on condition that it should not be enforced until after the death of the giver?* Or, to put it in another way was it given under an arrangement between the Plaintiff and the deceased under which it was only to take effect at his death. This again is a question of fact. The Court below find that the document was given " as a bequest." If by this finding they mean that it was so given by virtue of an arrangement between the two parties, again I think there was ample evidence to support such a finding. The fact that another document of the same character was executed almost simultaneously—the fact that the deceased when she executed those documents made observations showing that she did so in contemplation of her approaching death, and of the effect they would have on the distribution of her estate; the fact that the amount of the bond bore no relation to the value of the services said to have been rendered, or the benefits said to be enjoyed; the fact that the attendance of the Certifying Officer was procured by the parties interested—all these facts support this conclusion.

On the other hand there are facts the other way. The bond is said to have been given in substitution for another security which was thought to be less effectual, and to have been given in pursuance of a promise which was made at the time of the Plaintiff's marriage. The Plaintiff had rendered services to the deceased under such circumstances as to raise an implied promise to pay for them, and the deceased had enjoyed the use of the Plaintiff's property, under such circumstances as to give the Plaintiff at least a moral right to some

sort of payment. The deceased spoke of the bond not as a gift but as something due to the Plaintiff, and on receiving it the Plaintiff took immediate steps to secure her rights by putting it in suit.

Whatever might be the conclusion of the District Court on these questions, I do not think that it would be a conclusion which we should disturb.

As there seems some doubt whether the District Court have considered these questions of fact in the light of the principles we have indicated, I concur in the judgment of the Chief Justice (with which generally I desire to express my agreement) that the case must be remitted to the District Court for the purpose he has specified.

Case remitted to District Court.

[TYSER, C.J. AND BERTRAM, J.]

MARIOU KYRIAKOU CHRISTOPHI
v.
SAVA KYRIAKO CHRISTOPHI.

FAMILY LAW—INHERITANCE—CHANGE OF RELIGION—RIGHT OF MOSLEM DAUGHTER TO SHARE IN INHERITANCE OF CHRISTIAN FATHER—WILLS AND SUCCESSION LAW, 1895, SECS. 13, 43.

The circumstances enumerated in the Wills and Succession Law, 1895, as incapacitating a person, otherwise qualified, from succeeding to an inheritance under that law, are intended to be exhaustive, and cannot be supplemented either from the Sher' law, or from the law of the religious community of the deceased.

In the administration of an estate of an Ottoman Christian difference of creed no longer constitutes an incapacity to succession.

A daughter of Orthodox Christian parents married a Moslem and lived with him for 20 years under a Moslem name, without attending the religious rites of her original community.

HELD: *That (even assuming that a formal renunciation of Christianity and acceptance of Islam could be presumed from these facts), such a change of religion did not disqualify her from succeeding to a share in the estate of her deceased father.*

This was an appeal from a judgment of the District Court of Nicosia.

The Plaintiff claimed a share in the estate of her deceased father, as one of his heirs. The Defendants disputed her claim on the ground that she had lost her rights of inheritance by adopting the Moslem religion. The Plaintiff denied that she had adopted the Moslem religion and claimed to be still a Christian.